

Nanticoke Homes, Inc. and Chauffeurs, Warehousemen and Helpers, I.B.T.C.W.H. of America, Local Union No. 876. Cases 5-CA-11273, 5-CA-11555, and 5-RC-10937

May 7, 1982

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND ZIMMERMAN

On January 5, 1981, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order,² except as set forth herein.

Respondent manufactures single-family "pre-fab" homes. In calculating Respondent's backlog (the number of homes Respondent had orders to build) as part of evaluating Respondent's economic defense for its layoffs, the Administrative Law Judge used the actual production figures for the months in question rather than projected production figures. The General Counsel argues that Respondent, in fact, used the projected figures in calculating its backlog. While the record supports the General Counsel's contention, we find that even viewing the figures in the light most favorable to Respondent, which is apparently what the Administrative Law Judge did, the numbers, together with the other findings set forth in the Administrative Law Judge's Decision, do not support Respondent's contention that the layoffs were economically motivated.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

² See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for the rationale on interest payments.

The General Counsel also excepts to the Administrative Law Judge's failure to state in the Conclusions of Law that Respondent violated Section 8(a)(3) and (1) of the Act by the unlawful action it took against its employees. That is, the General Counsel contends that Respondent laid off employees because of the protected work stoppage and because of their membership in and activities on behalf of the Union. The General Counsel contends that the Administrative Law Judge made this 8(a)(3) finding but inadvertently failed to put it in the Conclusions of Law. We agree and hereby amend the Conclusions of Law.³

Finally, the General Counsel contends that the Administrative Law Judge erred in ruling that a surreptitiously recorded conversation, and transcript thereof, would only be admitted into evidence for the purposes of credibility and refreshing the recollection of witnesses. The General Counsel is correct. See *East Belden Corporation*, 239 NLRB 776, 782 (1978). However, the General Counsel stated, on the record, that the evidence which was contained on the tape was admitted by way of the direct testimony of Moore, the employee who recorded the conversation. Accordingly, the Administrative Law Judge's ruling is not reversible error.

Respondent contends that it was unaware of the union activities of its employees until August 5 or 6, 1979.⁴ It also contends that under the circumstances of this case the small-plant doctrine is inapplicable. We agree that the small-plant doctrine is inapplicable. However, we note that the Administrative Law Judge also found, based on the record as a whole, that Respondent had direct knowledge of the employees' organizational activity. Thus, the Administrative Law Judge specifically found that as of July 27 Respondent's president, Mervine, had in his possession a map directing the employees to a union meeting and that he asked various employees if they were aware of the meeting. On July 28 Mervine told employee Hughes that "whoever attends the meeting will be fired." Accordingly, on July 30, while discussing employee Dawson's 3-day suspension, Mervine told her that it was because of her union activities. Finally, also on July 30, Mervine asked employee Moore if he had attended the union meeting on Saturday. Accordingly, we agree with the Administrative Law Judge that as of at least July 27 Respondent was aware of its employees' union activities.

Respondent also argues that the work stoppage that occurred on July 20 was an unprotected sit-

³ Respondent excepts to the Administrative Law Judge's finding that between August 3, 1979, and February 22, 1980, it hired 60 new employees instead of 16. We agree and hereby correct that typographical error.

⁴ Unless otherwise specified, all dates herein are in 1979.

down strike. We disagree and find, as did the Administrative Law Judge, that the work stoppage was protected and that Respondent violated Section 8(a)(1) of the Act by its conduct as set forth in the attached Decision. See *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1970);⁵ *Lewittes Furniture Enterprises, Inc.*, 244 NLRB 810 (1979).

Finally, Respondent argues that the election should not be set aside because there was only one instance of unlawful interrogation after the election petition was filed on August 9. However, we note that the Administrative Law Judge also found that on August 9 and 10 and October 19 Respondent engaged in unlawful interrogation and threats. These occurred during the critical period and we agree with the Administrative Law Judge that the election should be set aside and a second election conducted.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5:

"5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by terminating, discriminating against, and refusing to reinstate or failing to reinstate the following employees because they engaged in protected concerted activities for their mutual aid and protection by engaging in a work stoppage and because of their membership in, and activities on behalf of, the Union:

Jeffrey Baker	Kenneth Mills
Craig Beebe	William Mack
Ronald Bounds	David Moore
William Butcher	Paul Moore
Timothy Chambers	Paul Morris
Frank Chaloupa	David O'Neal
Norman Coverdale	Kevin Passe
Dean Drosky	Thomas Parks
Benjamin Ewing	Cindy Phelam
Carol Goodhand	Eugene Price
Thomas Greenlee	Jefferson Rew
Lawrence Grimm	Ronald Ryall
Myron Hayes	John Shackley
Harry Haynes	Eric Smith
Eugene Hughes	James Snow
Michael Johnson	Wayne Sumpter
Martin Joseph	Loretta Tapscott
Paul Kenton	David Virdin
Lloyd King	N. J. Walsh
Lucas Lewis	Richard Warfield
Steve Marsh	James White
Jim McIntyre	Ruby Williams

⁵ Chairman Van de Water, while agreeing that the circumstances here do not indicate that the work stoppage was an illegal sitdown strike, does not approve the Board's decision in *Pepsi-Cola Bottling Co. of Miami, Inc.*, *supra*, and does not rely on it.

Charles Michaels Edwin Williamson
Curtis Millman Robert Worthington"

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Nanticoke Homes, Inc., Greenwood, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(e):

"(e) Post at its offices and places of business in Greenwood, Delaware, copies of the attached notice marked 'Appendix.'¹⁶ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election be, and it hereby is, set aside, and that Case 5-RC-10937 be, and it hereby is, remanded to the Regional Director for Region 5 to conduct a second election.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all parties had a chance to give evidence, it has been found that we, Nanticoke Homes, Inc., have violated the National Labor Relations Act, as amended, and we have been ordered to post this notice and to abide by the following:

WE WILL NOT terminate, discriminate against, refuse to reinstate, or fail to reinstate employees because they engaged in protected concerted activities for their mutual aid and protection by engaging in a work stoppage.

WE WILL NOT terminate, discriminate against, refuse to reinstate, or fail to reinstate

employees because of their membership in or because they engage in activities on behalf of Chauffeurs, Warehousemen and Helpers, I.B.T.C.W.H. of America, Local Union No. 876, or any other labor organization.

WE WILL NOT threaten to discharge employees if they engage in protected concerted activities for their mutual aid and protection or in any protected concerted work stoppage.

WE WILL NOT question employees concerning their participation in protected concerted activities, including strikes and work stoppages, for their mutual aid and protection.

WE WILL NOT question employees concerning their attendance at union meetings.

WE WILL NOT question employees concerning their sympathy for and activities on behalf of any labor organization, including Local Union No. 876.

WE WILL NOT create an impression that we are spying on our employees by telling them that we will watch them to learn if they continue to engage in activities on behalf of any labor organization, including Local Union No. 876.

WE WILL NOT offer pay increases to employees in exchange for information concerning activities of employees on behalf of any labor organization, including Local Union No. 876.

WE WILL NOT offer pay increases to employees to discourage activities on behalf of any labor organization, including Local Union No. 876.

WE WILL NOT threaten to suspend employees because of their activities on behalf of Local Union No. 876.

WE WILL NOT threaten to close the plant in order to discourage employee activities on behalf of Local Union No. 876.

WE WILL NOT threaten to discharge employees if they engage in activities on behalf of Local Union No. 876.

WE WILL NOT suspend employees because they engage in protected concerted activities with other employees for their mutual aid and protection by participating in a work stoppage.

WE WILL NOT suspend employees because they engage in activities on behalf of Local Union No. 876.

WE WILL NOT spy on our employees who attend union organizing meetings.

WE WILL NOT cease the operation of work shifts in retaliation for employees' membership in or activities on behalf of any labor organization, including Local Union No. 876.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL retract the work suspension suffered by Linda Diane Dawson, and WE WILL expunge from all our personnel and employment records the reference to the discriminatory suspension of Linda Diane Dawson.

WE WILL offer Linda Diane Dawson immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of pay and other benefits suffered as a result of her discriminatory suspension and termination, with interest.

WE WILL offer to the following employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole, with interest, for any loss of earnings suffered as a result of their being discriminatorily terminated and refused reinstatement:

Jeffrey Baker	Kenneth Mills
Craig Beebe	William Mack
Ronald Bounds	David Moore
William Butcher	Paul Moore
Timothy	
Chambers	Paul Morris
Frank Chaloupa	David O'Neal
Norman	
Coverdale	Kevin Passe
Dean Drosky	Thomas Parks
Benjamin Ewing	Cindy Phelam
Carol Goodhand	Eugene Price
Thomas Greenlee	Jefferson Rew
Lawrence	
Grimm	Ronald Ryall
Myron Hayes	John Shackley
Harry Haynes	Eric Smith
Eugene Hughes	James Snow
Michael Johnson	Wayne Sumpter
Martin Joseph	Loretta Tapscott
Paul Kenton	David Virdin
Lloyd King	N. J. Walsh
Lucas Lewis	Richard Warfield
Steve Marsh	James White
Jim McIntyre	Ruby Williams
Charles Michaels	Edwin Williamson

Curtis Millman Robert Worthington

NANTICOKE HOMES, INC.

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This case was heard in Georgetown, Delaware, on February 25, 26, 27, and 28, March 12, and April 8, 9, 10, 28, 29, and 30, 1980. By order consolidating cases issued on December 12, 1979, the Regional Director for Region 5 consolidated the complaint and notice of hearing in Case 5-CA-11555 with the complaint and notice of hearing in Cases 5-CA-11273 and 5-RC-10937. The complaint in Case 5-CA-11273 is based on a charge filed by Chauffeurs, Warehousemen & Helpers, I.B.T.C.W.H. of America, Local Union, No. 876, herein the Union or the Petitioner, on August 3, 1979, and the complaint in Case 5-CA-11555 is based on a charge filed by the Union on October 2, 1979. By order of the Board, dated December 7, 1979, the Board ordered that the issues raised by objections to conduct affecting the results of the election filed by the Petitioner on October 25, 1979, be processed pursuant to the Regional Director's order consolidating cases and notice of hearing.¹ The complaints allege that Respondent violated Section 8(a)(1) and (3) of the Act by, *inter alia*, threatening to discharge employees if they engage in protected concerted activities for their mutual aid and protection by participating in a work stoppage; interrogating employees concerning their participation in a protected concerted work stoppage; interrogating employees concerning their attendance at union meetings and/or their sympathy for and activities on behalf of the Union; creating the impression of surveillance by telling employees that Respondent would watch them to learn if they continued to engage in activities on behalf of the Union; offering pay increases to employees in exchange for information concerning the activities of employees on behalf of the Union and to discourage activities on behalf of the Union; threatening to suspend the employment of employees because of their activities on behalf of the Union; threatening to close the plant in order to discourage employee activities on behalf of the Union; threaten-

ing to discharge employees if they engage in activities on behalf of the Union; engaging in surveillance of employees in attendance at a union organizing meeting; discriminating against an employee by suspending her employment because she engaged in protected concerted activities; and interfering with, restraining, and coercing employees in the exercise of rights guaranteed them in Section 7 of the Act and discriminating against them by terminating their employment and refusing to reinstate them because they engaged in protected concerted activities.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, a Delaware corporation engaged in the business of manufacturing and erecting single-family homes at its Greenwood, Delaware, location. During the preceding 12 months, a representative period, Respondent received gross revenues in excess of \$500,000. During the same period, Respondent sold and shipped, in interstate commerce, products valued in excess of \$50,000 to points located outside the State of Delaware.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that Chauffeurs, Warehousemen and Helpers, I.B.T.C.W.H. of America, Local Union No. 876, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, Nanticoke Homes, Inc., is a Delaware corporation engaged in the business of selling and building single-family homes and offices at its Route 13, Greenwood, Delaware, plant. The Company was originally founded in 1971 by John Mervine and Al Tanyer to build homes for speculation, a practice which is no longer followed. Initially, the Company intended to construct homes in a traditional manner, i.e., built on site, but severe weather problems in early 1971 delayed construction of the Company's first houses and forced Nanticoke to devise an alternative method of construction. Mervine, the company president, developed the construction process whereby houses were built in two separate construction phases before being completed. The basic construction of the home is performed at the Greenwood, Delaware, plant. Prior to February 1979, the Company constructed homes on two production lines at its original plant, a converted chickenhouse located on property owned by company president Mervine. As business improved and the demand for the Company's houses increased, the need for expansion lead the Company to acquire additional land to build a new facility in the fall of 1978. The new plant, which became operational in November or December 1978, was intended to supple-

¹ Objections 1, 2, and 3 are as follows:

1. The Employer, by its agents and servants, interrogated employees concerning their attendance at union meetings and/or their sympathy for and activities on behalf of Petitioner.
2. The Employer, by its agents and servants, threatened to close the plant in order to discourage support of Petitioner.
3. The Employer, by its agents and servants, threatened to discharge employees if they engaged in activities on behalf of the Union.

In support of these objections, the Petitioner relied on the evidence submitted in the investigation of the unfair labor practice charge in Case 5-CA-11273. The Petitioner submitted no additional evidence in support of these objections. The Employer did not submit any additional evidence in reply to the allegations raised by these objections, but also relied on the evidence presented in the investigation of the unfair labor practice charge in Case 5-CA-11273. The Regional Director concluded that substantial and material issues had been raised with regard to the Petitioner's Objections 1, 2, and 3 which could best be resolved by a hearing. The issues involved in the complaints and the objections will be resolved in this Decision.

ment the production of houses at the Company's original plant. Initially, the Company's goal was to produce 2 houses a day at each plant, for a total of 20 houses a week from the 2 plants.

In February 1979, the Company's original plant burned to the ground and, as a result, two-thirds of the Company's production capability at that time was destroyed leaving only the newer plant with a single production line producing 5 houses instead of the average 15 houses per week.

Until the time of the fire, both plants had operated on a single-shift basis. After the fire a second shift was put into effect resulting in the productivity of that plant's single-line operation increasing to 10 houses per week or double what it had been. The company backlog time of houses on order was reduced from 11 months to 5.5 months with the institution of the second shift.

A. The Union Organizational Campaign

On Monday, July 23, 1979,² Union Agent Bob Reynolds contacted employee Paul Moore, who was then on the night shift, and a meeting was set for the next day. On the next day, Moore, Anthony Taylor, Greg Poore, and Lawrence Grimm met with union representatives at Moore's home. They discussed the problems at Nanticoke and the idea of having a larger meeting with more of the employees present. They set up a date and place for the next meeting, Saturday, July 28, at Ellendale Forest Pavillion. Moore's wife prepared a map to the place of the meeting and, after copies were made, Moore passed them out to the five individuals who showed up at the first meeting at Moore's home. After that, the maps were distributed by them to other employees in the plant. Also at that first meeting Anthony Taylor received a "smile the Teamsters are coming" sticker which he began wearing in the plant about a week later, approximately July 30. The map was accompanied by an announcement which read, "Anyone interested in seeing improvements at Nanticoke homes for employees, you are encouraged to attend an employee meeting on Saturday July 28, at 10 AM."

On Friday, July 27, the day before the Saturday meeting, Moore, who was working on the late shift, reported to work around 4 p.m., and around 4:15 p.m. John Mervine entered the plant through the warehouse door. Moore testified that Mervine spoke to Bill Smith, a supervisor. He said Mervine spoke loudly and called someone a liar. Mervine then went into the plant and proceeded to the sheetrock area, where he asked the sheetrockers, including Grimm, Poore, and Erik Smith, "Did you see the map?" Grimm replied, "What map?" Mervine then said, "It's hanging right up there. There is no way you could miss it. Wait a minute." Mervine then went to get the map and, with the map in his hand, he asked if the employees wanted to look at it. Grimm replied in the negative. Mervine laughed, folded the map, and left. Grimm later related to Moore that conversation with Mervine. On Saturday, July 28, the first union meeting open to all employees was held. About 20 em-

ployees attended and 19 signed a petition supporting the Union.

John Mervine testified that he first saw the map on Friday afternoon, July 27, but that it came onto his desk too late on Friday to mention anything about it to anyone until the Monday after the meeting, or July 30. At that time, he engaged Larry Grimm in a lengthy conversation in which he inquired as to whether there was a meeting over the weekend, to which Grimm responded in the affirmative.

According to Moore and Grimm, approximately 19 employees attended the meeting on July 28 at the Ellendale Forest Pavillion, where they were addressed by Union President Reynolds and were given a number of petitions to have signed by other employees in the plant. During the following week, employees, including Moore and Grimm, attempted to get their fellow workers to sign the union petitions. Moore and Grimm testified that their efforts were conducted secretly and that they did not engage in any organizational conduct on company time or in the presence of company officials.

B. The July 20 Work Stoppage

On Friday, July 20, employees Greg Poore, Erik Smith, and Lawrence Grimm, while riding to work in their carpool, discussed the possibility of engaging in a work stoppage that day. Upon arriving at the plant, each spoke with other employees that morning. They arrived at a decision to engage in a work stoppage around 9:15 a.m., after the morning break, in the area where decks for houses were being constructed. After the morning break, the employees on the day shift gathered in the deck area. The number of participants in the work stoppage grew rapidly to about 100. Company Plant Superintendent Maynard Nisley informed Company President Mervine that "all employees are sitting down." Mervine left his office, went to the plant floor, and observed nearly every employee on that shift "sitting in the deck area."³

When Plant Superintendent Nisley was informed of the work stoppage and of the employee's desire to talk with President Mervine, Nisley left and quickly returned with Mervine to the deck area. Mervine asked the employees if they were on or off the clock and what their problems were. Grimm stated that the problems included wages and working conditions. Greg Poore said that the employees wanted to talk and find out what was going on. Mervine responded by calling Poore a "smart mouth" and said, "Greg, we could do without you and we will dismiss you right now." Poore started to leave to get his tools but was told by his supervisor, Virgil Joseph, not to leave.⁴

³ When called by the General Counsel on the first day of the hearing, John Mervine testified that about 75 people were participants in the gathering on the deck and that a few employees did not engage in the work stoppage. When called on direct examination on April 20, 1980, Mervine testified that about 100 people participated in the work stoppage and that all employees sat down.

⁴ Mervine described the sitdown incident as follows:

I asked the first questions, are you on . . . our time or on your time, and without exception I think they were on our time.

Continued

² All events herein occurred in 1979 unless otherwise indicated.

Moore spoke up after Poore was fired and told Mervine to fire him also. Other employees voiced similar sentiments. Mervine then asked them what their complaints were. Employees Moore, Steve Marsh, Anthony Taylor, Linda Diane Dawson, and Grimm voiced their complaints. Mervine asked Grimm if he was the spokesman. Grimm said he could be. Mervine then told him to get a list of complaints together. Grimm testified that Mervine said, "No young people would run [his] place" and that he "just would not stand for something like that to go on in the manner that we were handling it." Grimm compiled a list of employee complaints and went into an office location in the plant building to meet with Respondent's representatives, John Mervine, Embleton, Nisley, Paul Collins, and Billy Mervine (John Mervine's son).

Grimm presented the grievances, including the desire for better working conditions, a paved driveway and parking lot, and annual raises. In response, Mervine pulled out Grimm's work record and reviewed it commenting that a factor in Grimm's favor was that he worked even after he had injured his finger. Grimm cited the training time he had put in at Respondent's without pay. Mervine then noted a 50-cent-an-hour raise which Grimm had been granted after the February fire. Mervine then stated that if Grimm was not happy with that raise he should immediately get up, leave, and look for work elsewhere without wasting any time. According to Mervine, "We discussed the three items that Mr. Grimm had written down as complaints from the employees. The parking lot, number one; the ability of leadmen and foremen to grant wage increases or to hire their own employees and doctor bills." Mervine told Grimm of the Company's financial problems, including the recent discovery of Company Controller Don Warnick that the Company was excessively overdrawn at the bank. When Grimm requested a wage increase for the employees, Mervine offered to show Grimm the Company's financial records in order to demonstrate the Company's inability to afford any raises at that time.

At the conclusion of their conversation, which lasted over an hour, Mervine and Grimm went back out to the

deck area of the plant where the employees were still seated. Grimm explained Mervine's responses. Mervine then informed the employees that he would be willing to discuss any personal problems with any employee on an individual basis, and directed them to take an "extended" lunchbreak of 1 hour after which they were to report to work at 12 noon.⁵ He asked them if they were off the clock and the employees replied that they were. At one point, Paul Moore stood up to say something and Mervine instructed him to sit down and be quiet, that Moore had already said too much that day.

During the lunchbreak, groups of employees engaged in discussions. About 10 to 15 congregated in the parking lot and concluded that Mervine's answers were unacceptable. That group included Greg Poore, Erik Smith, Mike Faulkner, Paul Moore, Diane Dawson, Mark Murphy, and Lawrence Grimm. Mervine approached them and asked if they would be returning to work. Grimm told Mervine that they were not satisfied with his answers to their complaints and that they wanted to do more talking. Mervine replied that he "didn't know how he could give him any better answers than that at the moment" and that they would have to decide "if you're going to go to work or not." Grimm responded that "he though he could get the people to go back to work."

Mervine returned to his office and the "parking lot" group of employees reentered the plant where they found about 25 other employees already gathered around the deck area. An announcement came over the loudspeaker that the employees should meet in the deck area. Mervine arrived with the employees' paychecks (it happened to be payday). Mervine announced that whoever wanted his check could come and get it and leave. When the first person stepped up to take his paycheck, Mervine added, "You know, if you take this check and walk out, you're gone." The check was returned and the other employees refused to accept their checks and returned to work. Respondent's version follows:

Shortly after Mr. Mervine returned to his office following this conversation, plant manager Nisley reported to him that the employees had still refused to return to work. Since it was the company's payday, Mr. Mervine instructed his secretary to bring all of the week's paychecks to him, which he placed in a box and took to the timeclock in the plant. Mr. Mervine handed the box of paychecks to Mr. Nisley, and informed the employees "that . . . the time for discussion has finished. Either we are going to get back to work or pick up your paychecks." Mervine warned the employees that if they picked up their paychecks at that time, they could leave the plant since in his opinion it would constitute a voluntary resignation on their part. No one chose to accept their paycheck and leave the plant, and everyone returned to work shortly thereafter. Mr. Mervine spent the rest of the day speaking to

And then I asked, why are you here? What is the problem? And many things were bantered back until—there was maybe 100 people there, until nothing was very clear. One man complained about his medical bills . . .

Larry Willey complained that his baby was sick and we hadn't paid the medical bills. Because, at Nanticoke Homes we pay all medical bills for them and their whole family . . .

Then I asked them if they would please let's find somebody to be a spokesman. Greg Poore made some very smart remark. I can't recall the remark, but I said to him, Greg, we could do without you, and we'll dismiss you right now . . .

Then Grimm spoke up, and I said, Mr. Grimm, are you going to be the spokesman, and he said, I can be. And he conversed with a few of the others and stepped forward as a spokesman. And so I said, all right tell us what is the problem.

And he said, I think three things. We have not been in the new plant many months, and we have not paved the parking lot. And there was one complaint about the parking lot, it was a bad place to park their cars, it was muddy at times . . .

The other thing was they complained—Mr. Grimm complained that the leadman did not have the authority to grant raises. One other item, was the third one, I can't recall, and they—then I suggested they come in for personal contacts and they agreed for Mr. Grimm to talk for the group.

⁵ During Grimm's meeting with Respondent, the employees continued their work stoppage. Most of them punched out on the timeclock around 10:15 a.m., continuing their sitdown strike.

individual employees. About an hour after the employees returned to work, Mervine approached Paul Moore and said, "I'm surprised at you, Paul." Moore responded "Oh yeah." Mervine said, "I still don't understand your complaint." When Moore began giving an explanation Mervine walked away.

C. Linda Diane Dawson's July 20 Conversation With Mervine

Among the employees who met with Mervine on his invitation to a one-to-one discussion with the employees was Linda Diane Dawson, who was called in to speak to Mervine around 2:30 p.m. on July 20. She met with Mervine and Nisley. Mervine asked Dawson what her complaint was. She told him she deserved a pay raise. Mervine told her she had agreed to her July 13 pay raise and therefore he did not understand her gripe. Dawson then discussed with Mervine the problems she was having with the other insulators on the assembly line and that she had told his son, Paul Mervine, and Nisley about the problems several times but nothing had been done. Mervine then told Dawson that he had heard that she was the instigator of the sitdown. Dawson said that she had arrived late, around 9:20 a.m., and did not know about the sitdown until that time. Mervine told her that she had a big mouth and a problem. He then said that she had to learn to keep her mouth shut and do her work if she wanted to keep her job. When Dawson was asked if she had other problems she began to discuss fixing the house she bought from Respondent. Mervine told her to discuss the house on her own time. Before ending the meeting, Mervine again warned Dawson to keep her mouth shut, to go back to work, and to do her job.

D. Moore's July 30 Conversation With John Mervine

Moore testified that on July 30 Mervine approached him in the warehouse while Moore was on his forklift and said, "I heard you're for the Union." Moore replied, "I don't know what you're talking about on company time." Mervine then asked Moore what he meant, and Moore told Mervine that he did not want to give Mervine a reason for firing him (Moore). Mervine then asked if Moore "really thought that he needed a reason to fire [Moore]." Moore replied, "I guess not." Moore then started the forklift as if to go back to work whereupon John Mervine raised his voice, pointed his finger at Moore's chest and nose at close range, and said, "Shut that thing off and don't start it until I tell you to."

Mervine then asked Moore, "Did you go to the union meeting on Saturday?" Moore told him he had, and Mervine then said, "So you're for the Union?" Moore said, "John, you don't give me much choice." Mervine said, "What do you mean?" Moore said, "The way you treat people around here." Mervine then raised his voice again and told Moore that he did not want to hear him speaking a word about the Union on company time. Moore said, "You know I won't, John." At that point Mervine walked off and Moore went back to work.

Employee Gene Hughes testified that on July 28, around 10:30 a.m., he was in Mervine's office, and Mervine told him that he heard "they was having a meeting

and I told him I ain't never heard nothing about it. He said, 'Good. Whoever attends the meeting will be fired.' So I told him I was going on vacation and he signed my check and I left." Hughes then went on a 2-day vacation and sometime after his return he had a conversation with John Mervine inside the plant. He testified as follows:

I came out of the house to talk to Mr. Mervine. He asked me about my hardhat. I didn't have any hardhat on. I told him I left it in my house. He said he heard I liked the word Union around here. The next time he hears the word Union I was done. Then I told him that Shirley Crenshaw had called me, a "black nigger." He laughed and said he couldn't believe she said nothing like that. He said he would talk to her. I don't know if he ever did.

Hughes was asked if Shirley Crenshaw ever apologized to him for that remark and he replied that, on the following Monday while he was speaking to John Mervine, Crenshaw came up to him and apologized.

E. Linda Diane Dawson's July 30 Conversation With John Mervine

Linda Diane Dawson testified that she had a conversation with president Mervine, concerning a 3-day suspension she received on July 30 for spending excessive time away from her work area. According to Dawson, she encountered Mervine in the office waiting room that morning while awaiting a meeting to discuss her suspension with Company Personnel Director Lester Kraft. When Dawson explained to Mervine why she was waiting for Kraft, Mervine said, "You don't have to talk to him about your suspension, I'm the one that authorized it." When Dawson asked Mervine why he did so, Mervine replied, "For your union activities."

Mervine's version of that conversation follows:

I said, Diane, what can I do for you? She said, I want you to erase my suspension and let me go back to work—

I said, Diane, I cannot do that. We have a plant superintendent who suspended you, and he feels like he has just reasons to do so, and I would hold no credence with my plant superintendent if I were to rescind whatever he did, so that's not possible

She said, why was I suspended? I said, It was very clear on your report, that you were suspended for walking all through the plant, not at your work station, and not doing your work

She said, that's not the case, why don't you tell me that you suspended me because of my union activities?

And I said, what union?

She said, well, you're going to reinstate me or I'm going to go to the Labor Board.⁶

⁶ I credit Dawson, who testified forthrightly, consistently, and without hesitation. I also credit Gene Hughes, who also testified in a straightforward manner.

Continued

F. The Conversation of July 30 Between John Mervine and Lawrence Grimm

On July 30, shortly after 7 a.m., Paul Moore and Anthony Taylor were in the employee's parking lot collecting signatures on the union petitions. Employees Grimm, Poore, and Erik Smith arrived. John Mervine approached Grimm in the parking lot. At that point, all of the employees except Grimm left the parking area and reported to work.

Mervine said to Grimm, "Mr. spokesman, I'd like to talk to you." Mervine then asked Grimm if he attended the Saturday meeting. Grimm replied, "What meeting?" And Mervine said, "You know what meeting." Grimm then admitted attending the meeting, after which Mervine asked what was said and who was there. Grimm responded that he did not have to reveal that information, and asked if he could be excused to report to work inasmuch as he was already late. Mervine told Grimm that he could not work there anymore and that, if Grimm was not willing to work with Mervine by giving the names and information on the meeting, Grimm was not part of Respondent anymore. Grimm asked if he was fired. Mervine said, "No, you have a week off." Again, Mervine asked why Grimm was not willing to work with Respondent and why Grimm was disrupting the plant and the employees. Grimm tried to explain that he was not solely responsible and Mervine again informed Grimm that, if he was not willing to work with Mervine or to tell him anything, then the week's suspension stood. Mervine also stated that the week off was for disrupting employees on July 20 and for making them sit down.

After a pause, Mervine said, "I'll give you a 75 cent raise if you can go inside the plant and get me 100 names of people willing to organize against me." Grimm said, "Sure, so you can go through and fire them all. That would be it for them." Mervine responded, "Well, you're pretty smart, aren't you?" Grimm responded, "Yes, I'm pretty smart." After Grimm turned the offer down, Mervine told Grimm he would still have a week off and inquired as to how he got to work. When he was told that Grimm rode with Greg Poore, Mervine told him that he would go get Greg and make him stop work, punch out, and take Grimm home.

Grimm further testified that Mervine took a few steps towards the building and stopped and there was a long

pause. He said that Mervine then walked back to him and said, "If I was willing to go in and not say anything to anybody, and keep my mouth shut, and that during this time he would have people watching me, I could go back to work. I wouldn't have a week off."⁷ Mervine told Grimm that if he would go in and keep quiet and not say anything that he would pay him for the 2 hours that they had stood out there and that everything would be all right. Grimm said that when he returned to work his fellow employees asked him many questions but he answered none.

Grimm completed his testimony in this regard by stating that Mervine told him in the parking lot that Grimm was one of his best workers, and that he had a good record, but "[a]s far as anybody's concerned, this is happening to you because you disrupted my workers on July 20 and that is, as far as anybody else is concerned, why I am doing this to you." Grimm said, "Well, me and you both know that you're doing it because we're trying to organize in the plant." And Mervine responded, "Yes, but that's just between me and you."

G. Paul Moore's Conversation With McKy Mervine

On July 30 during a lunch break McKy Mervine, Company President John Mervine's son who was also employed at the plant, asked Moore to speak with him privately. He and Moore walked outside and, after some words concerning McKy's law school plans, McKy said he was going to work for his father for a year and try to get into law school again the following year. McKy then told Moore, "I heard you're for the Union." He then asked Moore if Moore knew he was number one to go out the door. Moore responded by trying to explain his situation in the plant which brought about the union activities. McKy then said, "My dad is not going to be in the plant anymore. He's making me a grievance person." McKy told Moore that he thought Moore was a pretty good guy and would relay his impressions to his father. McKy then asked Moore if Moore could give him the names of other employees that were at the meeting Saturday. Moore refused to divulge any of the names to McKy.

H. Paul Moore's Conversation With Merle Embleton

Vice President Merle Embleton requested that Moore meet with him. Upon meeting, Embleton asked Moore if he was a born again believer. Moore replied that he was. Embleton asked Moore how he could get himself into such a mess and Moore asked if he was referring to the Union. Embleton replied in the affirmative and then proceeded to tell Moore that his actions were against his religion and that they were wrong. Embleton then told Moore that if he would change his mind he would have

ward, plain, and clear manner. I credit Paul Moore and Larry Grimm for substantially the same reasons. Whenever their testimony conflicted with that of John Mervine, who was alert, intelligent, and aware of more that was going on in the plant among his employees than he apparently was willing to admit, I credit them and not him. I surmise that, although he was not totally aware of his employee's rights to engage in union activity before consulting with counsel about the hearing in this matter, he was quick enough and intelligent enough to grasp most of what was involved and what legally could have or should have been done or said by the time of the hearing. Although counsel for Respondent attempts to make much of the fact that the word "Union" was not mentioned during the discussions of the employee meetings, and attempts further to translate that into lack of company knowledge of union activities, I am convinced both by the testimony of the credited witnesses and by the admissions of Respondent that Respondent was aware of the employee's protected concerted and union activities during the time they were occurring or shortly thereafter. In addition, I believe the small-plant doctrine is applicable in the circumstances of this case. *Florida Cities Water Company*, 247 NLRB 755 (1980); *Syracuse Dy-Dee Diaper Service*, 251 NLRB 945 (1980).

⁷ In his testimony, Grimm recalled that he asked Mervine after being informed that he was to be off a week whether he was to come in following that week and go back to work or whether he was to report to Mervine personally. He said that Mervine replied, "No. Before you can come back to work, you come see me next Friday in my office. We'll write up a piece of paper that you have to sign stating that you will have nothing to do with organizing in my plant. You have to sign that paper before you can come back to work for me."

strong pull with the Company. Moore replied that he did not feel that there was any alternative considering John Mervine's attitude. Embleton said that before Mervine would let the Union in he would close down and pull out, and concluded by asking Moore to think about changing his mind. Moore said he would think about it.

I. The Layoff of August 3

Respondent contends that the layoff of August 3 which resulted in the second shift being dropped completely was caused by the following, as stated by Respondent:

By the end of July the company was faced with poor quality homes, which were reflected in customer complaints and fewer final settlements, a declining housing market which showed in poor sales and concomitant decline in the backlog of houses on order, and an alarming cash shortage.⁸

The General Counsel, on the other hand, contends that the August 3 layoffs were unlawful; that, "after the numerous unsuccessful attempts at reasoning, bribing, cajoling and threatening employees to get them to 'work together' with Respondent, Respondent decided to lay off employees on the shift which, coincidentally, had participated in the July 20 work stoppage."⁹ On August 3, Bill Smith told Paul Moore that Plant Superintendent Nisley had told him that Moore had been laid off. Also on August 3, drywall, roof, and siding boss Virgil Joseph talked with some of his crew after work. According to Poore and Grimm, Joseph told them that the following week, the week beginning August 6, the night shift would be laid off for that week but would return the week after that and work on the day shift while other groups of employees would be off; and that no one would work at night anymore. Joseph told them that the action was necessary because the employees were building too many houses for the field crew to set up.

On Monday, August 6, and Tuesday, August 7, certain employees, including Grimm, Moore, Eugene Hughes, Erik Smith, and Steve Marsh, were told that they were permanently laid off. Other employees, including Greg Poore, Buddy Walls, and Anthony Taylor, were asked to report to work and did.

Insulator Linda Diane Dawson, who had been permitted to work full-time days rather than on an alternating schedule between day and night, was told by her supervisor, Shirley Crenshaw, on August 3, that she thought the night shift was going to be laid off. On August 6, Dawson reported to work on the day shift as usual. And at or about 7 a.m., Crenshaw told Dawson that the supervisors were going to be called in to decide which employees they wanted to keep and which to lay off. Crenshaw also told Dawson that, although she was leaving

Dawson's name on the list to be retained, she did not feel that Dawson would be retained because John Mervine had the overall say on who would be retained and who would be laid off. At the end of her shift on August 6, Dawson was told by Plant Manager Nisley that she would be laid off. Dawson asked the reason, inasmuch as she had seniority, but Nisley told her that she would be given the reason by a phone call and by written notice which would follow.

Dawson returned to the plant on August 7 and told John Mervine that she needed a written reason for her layoff in order to get food stamps. Mervine and Dawson went to see Lester Kraft, personnel director. Mervine asked Kraft if he knew anything about putting in writing the reasons for the layoff. Kraft said that he did not and that he did not plan on giving anybody any written reasons. Dawson then went to see Nisley and told him that she had received neither a phone call nor a written explanation for her layoff. Nisley referred Dawson to Kraft but Dawson told him she had just seen Kraft. Nisley then volunteered to telephone Kraft. Dawson returned to Kraft's office where she heard Kraft telling Nisley that he was not going to give any written reasons for layoffs and that if Nisley wanted to do so he could. Kraft then told Dawson that he was not going to give anything in writing and that if she wanted something in writing she should see his secretary, "Emily." Dawson told Kraft that he was giving her the runaround.

Dawson called Emily, who referred her to McKy Mervine. She talked to McKy Mervine, explaining to him the need for a written explanation of her layoff. McKy replied that they were not going to put anything in writing. Dawson asked him why she was laid off. McKy responded that the night shift was laid off. Dawson told him she worked days only and that she had seniority over all the other insulators. McKy told her that the supervisors had listed who would be kept and who would be laid off. Dawson told McKy that her supervisor, Crenshaw, had told Dawson she would not be laid off, whereupon McKy responded that Respondent had "to consider our troublemakers" and cited Dawson's 3-day suspension. Dawson told McKy that the suspension had been for union activities and was illegal, and asked if she was laid off permanently because of the earlier 3-day layoff. McKy said, "No. Wait a minute. You're putting words in my mouth."

Also on August 3, just before the end of the day shift, Bill Smith told Moore that Nisley told him that Moore was laid off. Smith told Moore that, when he was told that, he asked Nisley if Moore "could be kept on and Doc." Nisley replied, "No way, if I do it with one, there will be others complaining to do it."¹⁰

⁸ It seems more than mere coincidence that this situation would occur so soon after the July 20 sitdown and July union meetings. It appears that the Company doth protest too much.

⁹ Most employees who worked in the plant worked the day shift one week and the night shift the following week on a continuing alternating basis. The group of employees who had worked during the day shift on July 20 also worked the day shift on August 3, and would have worked at night the following week beginning August 6.

¹⁰ As previously indicated, I credit Moore, who testified without hesitation and in a calm straightforward manner. Nisley's response reveals that, contrary to Respondent's contention, the better workers were not left on the payroll, nor did Respondent follow its own immediate supervisors' recommendations with respect to the layoffs.

J. The August 7 Union Meeting at the Farmington Fire Hall

On August 7, Paul Moore, who was one of the permanently laid-off employees, talked to Union Representatives Bob Reynolds and Bob Brown and they agreed that Moore and a couple of others should go to the end of the lane at the plant and invite employees to a meeting that was scheduled for the Farmington Fire Hall that day starting at 3:30. They did go to the plant and invite many employees to attend the meeting. At 3:30, at the Fire Hall, they saw Bill Smith and Paul Collins, who were wearing yellow shirts with the word "Supervisor" written on them. Moore warned Larry Grimm, who had been speaking with them, that he should not be saying too much to them. Collins and Smith asked if they could come in to the meeting. Moore replied in the negative. According to Moore, Paul Collins said to Bill Smith, "Come on, let's go in and find out what's going on." Moore then went into the Fire Hall and told Union Representative Bob Reynolds that Collins and Smith were threatening to come in and asked whether Reynolds was going to allow them in. Reynolds instructed Moore to tell Collins and Smith that Reynolds would file charges against them if they attempted to come in and that he would have them thrown out. Moore went out and told Collins and Smith what Reynolds had said and one of them replied, "We're not going to cause any trouble. Why can't we come in?" Moore repeated what Reynolds had told him. Collins and Smith then went back to the parking lot and remained there at a distance of about 100 to 150 yards from the firehouse for about an hour.

K. The August 9 Taped Meeting Between Paul Moore and John Mervine

On Thursday, August 9, Paul Moore met with John Mervine in Mervine's office. Moore surreptitiously carried a tape recorder in his boot and taped the first 20 minutes of his conversation with Mervine.¹¹ Moore testified that, in the meeting, Mervine asked him if he was a "born-again believer" and that he replied that he was; whereupon Mervine asked him how he could get himself into such "a mess like this." Moore asked Mervine if he was referring to the Union and Mervine said, "Yes." Mervine told Moore why he thought that what Moore was doing was against their religion and wrong. Mervine then said, "I forgot. McKy wanted to be in on this conversation." Mervine asked Moore if he knew that McKy Mervine had been put in charge of personnel.

Mervine asked whether Moore had cards to get signed and Moore replied that they had petitions. Mervine asked, "You carried a petition, didn't you?" Moore re-

plied in the affirmative and said that he was one of six employees who carried nine petitions. Mervine then asked him how many signatures he had gotten on the petitions. Moore said "about a fifth of them." Mervine then asked him how many signed and Moore said "a little over 100, I think 116." At that, Mervine raised his voice in surprise and said, "116 names? You got almost the whole plant." Moore replied, "Basically, but not really." Moore then told Mervine, "You've laid off half of the ones that were for the Union, so that you don't have to worry about majority now, right? You can't hardly take me back now because I will help make a majority, right?" Mervine did not respond. Moore asked him what the chances were of his getting back after this was all blown over and Mervine replied, "I didn't want to fire anybody, Paul. I couldn't fire you. I couldn't fire Diane Dawson. I know that you know that."

Mervine then told Moore "about how he had been through it [union organizing] two years ago and had paid a lawyer \$5,000 to keep him out of trouble." At one point Mervine mentioned James Hoffa and how terrible unions were—how they slash people's car tires and kill and hang people. And then Mervine told him that "the last time there was union trouble he had received phone calls at home saying how that—threatening his family and stuff." He repeated, "Before I'd let the Union in here, I'd close down, sell the place, and move away. What good is all this without my life?" Moore then asked Mervine who had made threats on him and Mervine replied, "You." Moore said, "You mean the Union?" Mervine said, "No, the people from the plant." Then there was further conversation leading up to Moore's asking Mervine, "You mean I was fired for what happened two weeks ago?" Mervine replied, "That's what you were fired for, Paul; that's why Diane Dawson was fired; that's what nearly all the ones that were dismissed were for, an illegal sit down strike." Moore asked Mervine why he had waited 2 weeks. Moore said, "I had worked two weeks; worked my butt off two weeks. Why did you wait two weeks?" Mervine replied that he had to check with what he could do legally. Mervine said, "We did what we had to do, when we knew we were in the right." Mervine then told Moore, "I didn't put you on the street, you put yourself on the street, you put yourself out there."

Moore told of his conversation with Billy Smith wherein he was told that Smith asked Nisley if he could keep Moore on and let Doc go because Moore could run circles around Doc. Mervine responded, "Doc did have more time than you, didn't he?" Moore said, "Yes, he did; but Billy could have said the same thing about Mickey Faulkner. He'd only been there three or four months."

As the meeting ended Mervine told Moore that if he would change his mind he would have strong pull with the Company. Moore responded that he did not feel that "there was any other way, with John Mervine the way he was." Moore said that Mervine also told him, "Before I let a union in here, I'd close down; pull out." Mervine then asked Moore again about changing his mind and Moore told him he would think about it. Moore thanked

¹¹ Counsel for the General Counsel offered the tape into evidence. Counsel for the Respondent objected to the offer of admission. The tape was received, not as primary evidence, but only for the purposes of determining credibility or, if needed, to jog the witnesses' memories. The ruling was based on the fact that the two participants in the conversation that was recorded were present and able to testify regarding that conversation and indeed did so testify. The tape was played at the hearing by an employee of the Federal Bureau of Investigation who qualified as an expert in removing interferences from tapes. Although he considered the tape (after being processed in the Bureau's laboratories) to be of good quality, I found it to be for the most part unintelligible and therefore not usable in resolving credibility issues.

him "for talking to me like a human being" and then left Mervine's office.¹² Employee Anthony P. Taylor testified that, on or about August 7, he overheard a conversation between Supervisors Virgil Joseph and Joe Hayward. He heard Joseph tell Hayward that it did not do any good for Joseph to pick out the people he wanted to lay off because John Mervine changed it the way he wanted it. Employee Joseph "Buddy" Walls testified that he overheard Joseph tell Hayward that, after he submitted his list of names of people he wanted to keep and people he would be willing to lay off, the list was changed.

On or about August 10, Taylor was in the breakroom when John Mervine entered and asked Taylor how he felt about the Union. Taylor said he felt it was the only way employees would get ahead. Mervine responded the Union could not do Taylor any good. When Taylor said he did not believe that, Mervine said, "Well, can the Union find you a job . . . no, the Union can't find you a job, ask Steve Marsh."¹³ John Mervine recalled having a conversation with Anthony Taylor. He said he had asked Taylor what the sticker on his hat meant and Taylor responded that there was going to be an election and the Union was going to get in. Mervine admitted that he asked, "What will the Union do for you Mr. Taylor that Nanticoke is not doing?" Mervine testified as follows, "He said the Union would guarantee him jobs, and I said, 'If you think the Union would guarantee your jobs, ask the people who don't have jobs.'"

Mervine said that Walls was present during that conversation. When Mervine was asked whether he recalled asking Walls whether he had gone to union meetings, he responded, "Not to my knowledge, I certainly did not do that, that I would never do because we were well versed at the time what we could discuss and what we could not discuss." Mervine denied asking Walls that question but he admitted discussing the advantages and disadvantages of unions.

Shortly after his talk with Mervine, Supervisor Virgil Joseph kept prodding Walls to produce more, telling him that they had to produce three houses a day or he would find someone else to do it. Such prodding had not occurred prior to the advent of the organizational drive. The following Monday Joseph apologized to Walls about his (Joseph's) behavior Friday stating that he was out of line. Walls acknowledged the apology but then Joseph asked Walls what the Union would be doing for him. Walls replied that the Union would get employees raises and sick leave. Joseph closed by saying it was Walls' decision.

L. Mervine's Statements in October and December

Anthony P. Taylor testified that, at or about a week before the October 19 Board-conducted election, he heard that a union representative and one of Nanticoke's supervisors had a fight. At or about 10 a.m., Taylor said he was standing in the warehouse when Mervine walked

up to him and said, "You are the cause for this." Taylor responded, "Cause for what?" Mervine said, "For the fight this morning." Taylor said, "How do you figure I am the cause for it?" Mervine responded, "You brought those people here, you are the leader." When Taylor denied being the leader or being present Mervine said, "Oh, you are the leader, that is why you were at the hearing."¹⁴ Taylor told Mervine he was subpoenaed and had no choice. Mervine then poked at the Teamsters stickers that Taylor had on his hat and told Taylor that he would not have "these kind of people" in his plant and "I will remember you for this" and walked away. Mervine admitted pointing his finger at Taylor's head and touching the sticker on Taylor's helmet. The sticker read, "Smile, the Teamsters are coming."

Roy Austin and Bob Reynolds, Teamsters representatives, and employee Paul Moore were at Respondent's gate on the morning of the election (October 19). John Mervine approached them and told them that the laid-off employees would not be permitted on the premises or nearby. Moore asked John Mervine about going back to work and Mervine stated, "No way, under no circumstances will you ever work for me again. You chose the wrong side, you chose the Union and that's the wrong side."

Later that day, Mervine again approached discharged employees Moore, Grimm, Eric Smith, and David Vernon, who were at the gates, and asked them how they had been and, directing his remarks to Moore, asked him what he thought the chances were of getting back in to work for Respondent. Moore replied that it really did not matter. Mervine called him a liar; whereupon Moore said that he would not be there voting unless he thought the chances were pretty good. Mervine then said, "You will never, never get in there . . . it'll be you or me, but not both of us in the plant."

Walls testified that, at a meeting in December, John Mervine told the group that he had enough house orders to last through June 1980.

M. The Supervisory Status of McKy Mervine, Shirley Crenshaw, Paul Collins, Carl "Billy" Smith, Virgil Joseph, and Paul Mervine

Respondent denies that Paul Mervine, McKy Mervine, Paul Collins, Carl "Billy" Smith, Shirley Crenshaw, Virgil Joseph, and Paul Mervine are supervisors.

McKy Mervine is John Mervine's son who was put in charge of personnel and appointed Respondent's employee grievance representative. John Mervine stated that McKy Mervine had asked to be present during the August 9 taped conversation between Mervine and Moore. McKy Mervine did not wear a blue shirt as worn by workers or a yellow shirt as worn by supervisors. He wore street clothes in the plant as did Respondent's top management.

Respondent's position is that McKy was not paid any salary and that he worked when he "felt like it." McKy Mervine testified that he spent no more than 4 to 5 hours a week at the plant. Respondent's organization chart

¹² As previously indicated, I credit Moore whose memory was good and who testified without hesitation, candidly, and unequivocally. The same cannot be said of John Mervine.

¹³ Marsh was a roofer who had been permanently laid off on August 3.

¹⁴ The NLRB preelection hearing.

shows that for July and August McKy Mervine was part of Respondent's organization as "John Mervine II." John Mervine testified that McKy Mervine "was in every part of the plant, in offices, everywhere. He may have been in the personnel office for a day or two, I don't know."

The testimony reveals that McKy Mervine was considered by the employees to be a member of management and, indeed, McKy Mervine held himself out to be a member of management and not a rank-and-file worker. I find that McKy Mervine is an agent of Respondent.

Paul Mervine is John Mervine's brother. On Respondent's organization chart Paul Mervine appears as an assistant to Plant Manager Maynard Nisley and on the same level on the chart with admitted supervisors John Meredith and Barry Groton. Respondent's computer printout for all employees as of August 8 shows Paul Mervine as part of Department 101, plant supervisor. Respondent denies that Paul Mervine was a supervisor. Diane Dawson testified that, when she met with John Mervine, Personnel Director Lester Kraft, and McKy Mervine, Paul Mervine was her supervisor. Kraft agreed that Meredith and Paul Mervine had arranged that Paul Mervine would be the supervisor for the day shift and Meredith would supervise the night shift. Paul Mervine was introduced to Diane Dawson as her supervisor. She went to Paul Mervine when she needed help or when she wanted permission to arrive late or leave early. Paul Mervine gave her an immediate answer to those requests. Dawson approached Paul Mervine when she requested a raise. Paul Mervine also supervised the performance of the work and saw to it that it was accomplished, and was responsible for the protection from weather when the houses were taken to the sites. I find that Paul Mervine is a supervisor within the meaning of the Act.

Shirley Crenshaw had been an insulator during the day shift and had an accident which affected her abilities to work with insulation. During late July, she kept time and performance records for work done by the insulators and assigned insulators to work areas for a particular day. She wore street clothes rather than working clothes or uniforms and, according to Diane Dawson, Crenshaw made the preliminary decision on which insulators would be laid off and which would be kept on the payroll. On Respondent's organization chart Crenshaw is placed on the same level as those wearing yellow shirts with the word "supervisor" written on them. Although she is listed on the employee roster for August 6 as "lead person on days" in the insulation section of Department 110 and Meredith is listed as the department's foreman, Crenshaw signed the employee warning slip which was issued to Dawson on July 27 over the space for "supervisor's signature." Nisley testified that Crenshaw's job was to keep track of employees' time and performance, to place employees into specific areas, and to talk with employees if their work performance was deficient. I find that Crenshaw was a supervisor within the meaning of the Act.

Paul Collins, Carl "Billy" Smith, and Virgil Joseph wore Respondent's uniform yellow shirts which had the word "supervisor" printed on them. Collins supervised framing, Smith the warehouse, and Joseph headed the dry wall roof and siding department. Joseph was intro-

duced to employee Taylor by Nisley in August of 1977 as Taylor's supervisor. Taylor has since worked under Joseph. Taylor testified that Joseph has disciplined employees, recommended that employees be disciplined or terminated, kept their record of absences, told employees what jobs to do, and made intradepartmental transfers. Taylor also testified that Joseph gave permission to employees to leave early, issued written employee warnings, suspended employees for disobeying direct orders, and told employees that if they did not produce more work he would terminate them.

Employee Walls testified that he has approached Joseph for raises from time to time, who in turn spoke to Nisley, who obtained final approval from John Mervine. When Walls asked Joseph for a raise, Joseph replied that he would see what he could do. Joseph signed recommendations for employee raises which were transmitted through the plant manager and finally approved by John Mervine. Moreover, counsel for the General Counsel adduced exhibits showing Joseph's approving his own vacation requests. As in the case of Crenshaw, Joseph kept employee time and production records.

Paul Collins' job functions were similar to Joseph's but in a different department. Collins was present as part of the management team on July 20 when employee spokesman Grimm met with Mervine and other management people. There is also uncontroverted evidence that, when Moore was first hired by Respondent in July of 1977, Nisley introduced Collins as Moore's supervisor.

Carl "Billy" Smith's authority was similar to that of Joseph and Collins but in a different department. Although these employees wore yellow shirts with the word "supervisor" on them they did not have the direct authority to hire or fire. Notwithstanding, they did have the authority to recommend promotions, layoffs, and retentions at times of layoff, to report rule infractions, and to fill out disciplinary forms recommending discipline. They assigned work and evaluated employees' performance. They had authority to permit an employee to come in late or to leave early.

Respondent's position is that the plant production area is headed by Nisley, with the assistance of Meredith and Groton, and that they were the only supervisors over the 160 employees who worked two shifts in the plant. It further contends that, even though the word "supervisor" is on the yellow shirts and yellow shirt wearers were set apart from the rank-and-file employees, they were merely "leadmen" and the word "supervisor" is a misnomer.

I find that Respondent's position is wholly without merit and that Paul Collins, Carl "Billy" Smith, and Virgil Joseph are indeed supervisors within the meaning of the Act.

I find the following conduct by John Mervine to be violations of Section 8(a)(1) of the Act: the July 20 statement to Grimm that Grimm should leave if he was not happy with his raise (in the circumstances of the work stoppage of that day which I consider to be protected concerted activity); the July 20 statement that if employees took their paychecks they were fired for participating in the work stoppage; the July 30 statement condi-

tioning Grimm's return to work on his pledging to refrain from organizing Respondent's employees; the July 30 statement that the suspension was due to Grimm's disruptive July 20 action (the work stoppage); the July 30 statement to Dawson that she was suspended for her union activities; the July 20 interrogation of Dawson concerning her participation in the work stoppage and the possibility of her being the "instigator" of the work stoppage; the July 27 interrogation of Grimm regarding the map and the Union's July 28 meeting; the July 30 interrogation of Grimm regarding the Union's July 20 meeting; the July 30 interrogation of, and threats to, Grimm regarding the July 20 work stoppage and Grimm's participation in the work stoppage; the July 30 interrogation of Dawson regarding the Union's July 28 meeting and the informational flyer for the meeting; the July 30 interrogation of Dawson regarding her sympathies with respect to the Union; the July 30 interrogation of Moore regarding his sympathies with respect to the Union; the August 9 interrogation of Moore regarding his activities on behalf of, and sentiments with respect to, the Union; the August 10 interrogation of Taylor and Walls regarding their sympathies with respect to, and activities on behalf of, the Union; the October interrogation of Taylor regarding Taylor's attitudes toward, and activities on behalf of, the Union; the July 20 threat to Dawson to fire her unless she kept her mouth shut and did her work (in the framework of the work stoppage); the July 30 threat to Grimm to terminate him unless he gave Mervine names and information on the meeting; the July 30 suspension, or threat to suspend, Grimm because of Grimm's refusal to supply the information on the July 28 meeting; the July 30 threat to Dawson to discharge employees because of their protected and/or union activities; the July 26 and 31 threats to Hughes to fire anyone who attended the employees' meeting; the August conditioning of Hughes' reemployment on the election outcome; the August 9 threat to Moore to close the plant because of the Union; the August 9 statement to Moore that the protected concerted July 20 work stoppage was the cause of the employees' permanent layoff; the August 9 statement to Moore that Respondent would take retaliatory action against the employees because of the protected July 20 work stoppage; the August statements to Taylor and Walls regarding the futility of choosing a union; the August threats to Taylor to lay off employees for engaging in activity in support of the Union; the August statement to Walls imposing a more restricted work condition because of Walls' prounion sympathies; the October threats to Taylor that Mervine would "remember" Taylor because of Taylor's prounion sympathies and activities; the October 19 threats to Moore that he would not be reemployed because of his prounion sympathies and activities; the July 30 creation of an impression of surveillance by engaging in said interrogation and by threatening to watch Grimm's activities in the plant; the July 30 attempt to bribe Grimm in return for information regarding the employees' protected and/or union activity; and the July 26 statement to Hughes which created an impression of surveillance.

The following conduct of McKy Mervine constituted violations of Section 8(a)(1) of the Act: the July 30 inter-

rogation of Moore regarding Moore's sympathies with respect to, and activities on behalf of, the Union; and the August 7 statements to Dawson that persons were laid off because they were "troublemakers" referring to the employees' protected concerted union activities.

I also find Supervisors Collins' and Smith's August 7 activities which created an impression of surveillance of employees' union activities to be violations of Section 8(a)(1), and Supervisor Embleton's August 2 interrogation of Moore about his sympathies regarding and activities on behalf of the Union and Embleton's August 2 threat to close the Company before letting a union in to be violations of Section 8(a)(1). Finally, I find Supervisor Joseph's August interrogation of Walls regarding Walls' sympathies and attitudes towards the Union to be violations of Section 8(a)(1) of the Act.

N. Discussion and Conclusions

Respondent contends that production inefficiencies and increased customer complaints concerning poor quality workmanship on houses completed in May and June, resulting in a drop in the number of homes settled, sold, and paid for in June and July, caused a termination of the second shift and the big layoff on August 3. Respondent also attributes the August 3 layoff to a declining housing market, poor sales, and an "alarming" cash shortage. However, Respondent does not explain why, just prior to the alleged economic layoffs, Respondent was busy hiring new employees. According to Respondent's pay records, 60 new employees were hired between July 16 and August 3. Three were hired within 1 or 2 days of the economic layoff. In addition, Respondent began hiring new employees within a short time after the August 3 layoffs and, contrary to past practice, did not recall its laid-off employees. Between the August 3 layoff and February 22, 1980, Respondent hired 60 employees in its various departments.

From the above and based on my other findings herein, I conclude that Respondent's permanent layoff of 49 employees and its refusal to recall them was not for the reasons stated by Respondent but for the purpose of thwarting the union organizational campaign and to deprive its employees of a possible majority vote for the Union in the then upcoming Board-conducted election.

I also find merit in the Union's objections to that election. I find that Respondent's illegal conduct affected the results of the October 19, 1979, election and, accordingly, I shall recommend that the election be set aside and that the Regional Director be ordered to arrange and conduct a new election.

Respondent's sales records from October 1978 through January 30, 1980, reveal that 2 months before the layoff, June 1979, it received the largest number of orders (76) of any month during that period. In August 1979, the month of the layoff, it received 71 orders. In June 1979, Respondent had built 65 houses and had a backlog of orders on hand of 252 houses which translates to 3.9 months' production. In July 1979, it received 43 orders, built 67 houses, and had a backlog of 247 houses (3.6 months' production). In August 1979, it received 71 orders, built 47 houses (a dramatic drop from the 67 built

the previous month), and had a backlog of orders on hand of 272 (5.8 months' production). In September 1979, the orders received were 54, houses built 46, and backlog of orders on hand 249 (5.4 months' production). For the period of October 1978 through January 30, 1980, the averages were: orders received 48, houses built 5, and backlog of orders on hand 247 (5.0 months' production).

Contrary to Respondent's contention, the above figures do not indicate a need for the big layoff of August 1979. Those statistics indicating the number of new hires shortly before and after the layoff convince me that the reasons offered by Respondent for the August 3 layoff are pretextual.

The employees who engaged in the August 3 sitdown strike did not lose the Act's protection under Sections 7 and 13. They had not seized the Employer's property or engaged in violence against nonstrikers. They conducted themselves peacefully, and did not use obscene language, make abusive threats against nonstrikers, or engage in other acts which would deprive them of the protection of the Act. The Board in *General Telephone Company of Michigan*, 251 NLRB 737 (1980), stated that the law is clear that, when an employer disciplines an employee because he has engaged in an economic strike, such discipline violates Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Nanticoke Homes, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Warehousemen and Helpers, I.B.T.C.W.H. of America, Local Union No. 876, is a labor organization within the meaning of Section 2(5) of the Act.

3. Nanticoke Homes, Inc., has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by threatening to discharge employees if they engaged in protected concerted activities for their mutual aid and protection; interrogating employees concerning their union participation and protected concerted activity, including strikes and work stoppages for their mutual aid or protection; interrogating employees concerning their attendance at union meetings; interrogating employees concerning their sympathy for and activities on behalf of Chauffeurs, Warehousemen and Helpers, I.B.T.C.W.H. of America, Local Union No. 876; creating an impression of surveillance of its employees by telling them that it would watch them to learn if they had continued to engage in activities on behalf of any labor organization; offering pay increases to employees in exchange for information concerning the activities of employees on behalf of the Union; offering pay increases to employees to discourage activities on behalf of the Union; threatening to suspend the employment of employees because of their activities on behalf of the Union; threatening to close the plant in order to discourage employee activities on behalf of the Union; threatening to discharge employees if they engage in activities on behalf of the Union; suspending an employee because she engaged in protected concerted activities with other employees for their mutual aid and protection by participation in a work

stoppage; suspending employees because they engaged in activities on behalf of the Union; surveillance of employees who attend union organization meetings; terminating work shifts in retaliation for employee's membership in or activities on behalf of the Union; and interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by suspending and discharging employee Linda Diane Dawson and failing and refusing to reinstate her because of her membership in and activities on behalf of the Union and because she engaged in concerted activities and activities on behalf of the Union and because she engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by terminating, discriminating against, refusing to reinstate, or failing to reinstate the following employees because they engaged in protected concerted activities for their mutual aid and protection by engaging in a work stoppage:

Jeffrey Baker	Kenneth Mills
Craig Beebe	William Mack
Ronald Bounds	David Moore
William Butcher	Paul Moore
Timothy Chambers	Paul Morris
Frank Chaloupa	David O'Neal
Norman Coverdale	Kevin Passe
Dean Drosky	Thomas Parks
Benjamin Ewing	Cindy Phelam
Carol Goodhand	Eugene Price
Thomas Greenlee	Jefferson Rew
Lawrence Grimm	Ronald Ryall
Myron Hayes	John Shackley
Harry Haynes	Eric Smith
Eugene Hughes	James Snow
Michael Johnson	Wayne Sumpter
Martin Joseph	Loretta Tapscott
Paul Kenton	David Virdin
Lloyd King	N. J. Walsh
Lucas Lewis	Richard Warfield
Steve Marsh	James White
Jim McIntyre	Ruby Williams
Charles Michaels	Edwin Williamson
Curtis Millman	Robert Worthington

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Objections 1, 2, and 3 are meritorious and are sustained.

THE REMEDY

Inasmuch as it has been found that Respondent has committed unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain action necessary to effectuate the purpose of the Act. I have found that Respondent committed many violations of Section 8(a)(1) of the Act, and sus-

pendent and discharged Linda Diane Dawson and discharged other employees in violation of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay which they have suffered as a result of the discrimination practiced against them. Backpay provided herein with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As I have found that Respondent engaged in conduct violative of Section 8(a)(1) and Section 8(a)(3) and (1) of the Act and that such conduct also interfered with the holding of a free election, thereby effecting the results of the election conducted in Case 5-RC-10937, I shall recommend that the election be set aside and that Case 5-RC-10937 be severed from Cases 5-CA-11273 and 5-CA-11555 and remanded to the Regional Director for Region 5 for the purpose of conducting a new election at an appropriate time to be fixed by the Regional Director.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁵

The Respondent, Nanticoke Homes, Inc., Greenwood, Delaware, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating, discriminating against, refusing to reinstate, or failing to reinstate employees because they engage in protected concerted activities for their mutual aid and protection by engaging in a work stoppage.

(b) Terminating, discriminating against, refusing to reinstate, or failing to reinstate employees because of their membership in and/or because they engage in activities on behalf of the Union herein or any other labor organization.

(c) Threatening to discharge employees if they engage in protected concerted activities for their mutual aid or protection or in a protected concerted work stoppage.

(d) Questioning employees concerning their participation in protected concerted activities, including strikes and work stoppages for their mutual aid and protection.

(e) Questioning employees concerning their attendance at union meetings.

(f) Questioning employees concerning their sympathy for and activities on behalf of any labor organization, including the Union herein.

(g) Creating an impression that Respondent is spying on its employees by telling them that Respondent would watch them to learn if they continued to engage in activities on behalf of any labor organization, including the Union herein.

(h) Offering pay increases to employees in exchange for information concerning activities of employees on

behalf of any labor organization, including the Union herein.

(i) Offering pay increases to employees to discourage activities on behalf of a labor organization, including the Union herein.

(j) Threatening to suspend the employment of employees because of their activities on behalf of the Union.

(k) Threatening to close the plant in order to discourage employee activities on behalf of the Union.

(l) Threatening to discharge employees if they engage in activities on behalf of the Union.

(m) Suspending employees because they engage in protected concerted activities with other employees for their mutual aid and protection by participation in a work stoppage.

(n) Suspending employees because they engage in activities on behalf of the Union.

(o) Engaging in surveillance of employees who attend union organization meetings.

(p) Ceasing the operation of work shifts in retaliation for employee's membership in or activities on behalf of any labor organization, including the Union herein.

(q) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Linda Diane Dawson immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings suffered by her suspension and termination in the manner set forth in the Section herein entitled "The Remedy."

(b) Expunge from the employment record of Linda Diane Dawson any reference to the 3-day suspension referred to herein.

(c) Offer to the following employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by them as a result of their suspension and termination in the manner set forth in the section herein entitled "The Remedy."

Jeffrey Baker
Craig Beebe
Ronald Bounds
William Butcher
Timothy Chambers
Frank Chaloupa
Norman Coverdale
Dean Drosky
Benjamin Ewing
Carol Goodhand
Thomas Greenlee
Lawrence Grimm
Myron Hayes
Harry Haynes
Eugene Hughes
Michael Johnson

Kenneth Mills
William Mack
David Moore
Paul Moore
Paul Morris
David O'Neal
Kevin Passe
Thomas Parks
Cindy Phelam
Eugene Price
Jefferson Rew
Ronald Ryall
John Shackley
Eric Smith
James Snow
Wayne Sumpter

¹⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Martin Joseph	Loretta Tapscott
Paul Kenton	David Virdin
Lloyd King	N. J. Walsh
Lucas Lewis	Richard Warfield
Steve Marsh	James White
Jim McIntyre	Ruby Williams
Charles Michaels	Edwin Williamson
Curtis Millman	Robert Worthington

(d) Preserve and make available to the Board or any of its agents, upon request, all records necessary to analyze the amount of backpay due under the terms hereof.

(e) Post at its offices and places of business in Greenwood, Delaware, copies of the attached notice marked "Appendix."¹⁶ Copies of said notice, on forms provided

by the Regional Director for Region 5, after being duly signed by Respondent's authorized representatives, shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Objections 1, 2, and 3 be sustained and that the election held on October 19, 1979, in Case 5-RC-10937 be set aside and a second election be held at an appropriate time to be fixed by the Regional Director.

¹⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursu-

ant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."